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DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 11

[Docket No. PTO-C-2022-0028]

RIN 0651-AD62

Final Rule Eliminating Continuing Legal Education Certification and Recognition for Patent Practitioners

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Final rule.

SUMMARY: This final rule adopts, without change, an interim final rule with a request for comments published in the Federal Register on November 14, 2022, that eliminated provisions of the Code of Federal Regulations related to voluntary continuing legal education (CLE) certification and recognition for registered patent practitioners and individuals granted limited recognition to practice in patent matters before the United States Patent and Trademark Office (USPTO or Office).

DATES: *Effective Date:* February 27, 2023.

FOR FURTHER INFORMATION CONTACT: Will Covey, Deputy General Counsel and Director for the Office of Enrollment and Discipline (OED Director), at 571-272-4097.

SUPPLEMENTARY INFORMATION: The USPTO adopts a final rule amending 37 CFR 11.11(a)(1) and (a)(3) to eliminate provisions concerning the voluntary CLE certification for registered patent practitioners and persons granted limited recognition to practice in patent matters before the USPTO under 37 CFR 11.9.

Effective August 3, 2020, 37 CFR 11.11(a)(3) provided that patent practitioners could voluntarily certify completion of CLE to the OED Director (Setting and Adjusting Patent Fees During Fiscal Year 2020, 85 FR 46932). Section 11.11(a)(1) provided that the OED Director

may publish whether each registered patent practitioner or person granted limited recognition under 37 CFR 11.9 has voluntarily certified that they completed the specified amount of CLE in the preceding 24 months.

On October 9, 2020, the USPTO published proposed CLE guidelines with a request for comments (Proposed Continuing Legal Education Guidelines, 85 FR 64128). The USPTO received public comments through January 7, 2021. On June 10, 2021, the USPTO published a Federal Register Notice providing, inter alia, that the USPTO would proceed with the voluntary CLE certification in the spring of 2022 (New Implementation Date for Patent Practitioner Registration Statement and Continuing Legal Education Certification, 86 FR 30920). On December 16, 2021, after considering public comments received regarding the proposed CLE guidelines, the USPTO published another Federal Register Notice indefinitely delaying implementation of the voluntary CLE certification (New Implementation Date for Voluntary Continuing Legal Education Certification, 86 FR 71453).

After receiving and considering stakeholder feedback on the certification process and possible details regarding implementation, the USPTO determined that it will not implement the voluntary CLE certification program at this time. Accordingly, on November 14, 2022, the USPTO published an interim final rule (IFR) eliminating voluntary CLE certification and recognition provisions from the rules governing practice in patent matters before the Office. The IFR provided an opportunity for interested persons to submit comments on or before December 14, 2022. The USPTO did not receive any comments. Based on the rationale set forth in the IFR, the USPTO adopts the IFR without change.

In the future, the Office may reconsider CLE reporting for patent practitioners, and nothing in this notice is intended to restrict or prohibit such action at a later time.

Discussion of Specific Rules

The USPTO amends § 11.11 to remove the last sentence in paragraph (a)(1) to reflect the elimination of the voluntary CLE certification for registered patent practitioners and individuals

granted limited recognition to practice in patent matters before the USPTO under 37 CFR 11.9, and to remove the entirety of paragraph (a)(3).

Rulemaking Requirements

A. Administrative Procedure Act: This final rule, without change, removes the provisions that apply to voluntary CLE certification for registered patent practitioners and individuals granted limited recognition to practice in patent matters before the USPTO under 37 CFR 11.9. The changes in this rulemaking involve rules of agency practice and procedure, and/or interpretive rules. *See Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (interpretive rules "advise the public of the agency's construction of the statutes and rules which it administers") (citations and internal quotation marks omitted); *Nat'l Org. of Veterans' Advocates* v. *Sec'y of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001) (rule that clarifies interpretation of a statute is interpretive); *Bachow Commc'ns Inc.* v. *FCC*, 237 F.3d 683, 690 (D.C. Cir. 2001) (rules governing an application process are procedural under the Administrative Procedure Act); *Inova Alexandria Hosp.* v. *Shalala*, 244 F.3d 342, 350 (4th Cir. 2001) (rules for handling appeals are procedural where they do not change the substantive standard for reviewing claims).

Accordingly, prior notice and an opportunity for public comment for the changes in this rulemaking are not required pursuant to 5 U.S.C. 553(b) or (c), or any other law. *See Perez*, 135 S. Ct. at 1206 (notice-and-comment procedures are not required when an agency "issue[s] an initial interpretive rule" or when it amends or repeals that interpretive rule); *Cooper Techs. Co.* v. *Dudas*, 536 F.3d 1330, 1336-37 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), do not require notice-and-comment rulemaking for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" (quoting 5 U.S.C. 553(b)(A))).

Moreover, the Office, pursuant to the authority at 5 U.S.C. 553(b)(B), finds good cause to adopt this final rule without prior notice and an opportunity for public comment, as such procedures would be contrary to the public interest. This rule will make final the removal of

provisions related to voluntary CLE certification from the regulations at 37 CFR 11.11(a) to avoid any confusion as to the status of the program. Although the voluntary CLE certification program was codified in the regulations, it was never implemented, and no patent practitioner participated in the program. Implementing this interim rule without prior notice and an opportunity for public comment is in the public interest because the time needed to do so would further delay the removal of the regulations and could lead to confusion as to the current status of the program among practitioners who practice before the USPTO.

B. Regulatory Flexibility Act: For the reasons set forth below, the Senior Counsel for Regulatory and Legislative Affairs, Office of General Law, of the USPTO has certified to the Chief Counsel for Advocacy of the Small Business Administration that the changes in this rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b).

This final rule will eliminate the provisions related to voluntary CLE certification. Because the voluntary CLE certification program was never implemented, no registered patent practitioners or persons granted limited recognition to practice in patent matters before the USPTO will be affected. Accordingly, the changes are expected to be of minimal or no additional burden to those practicing before the Office, and this rulemaking will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 12866 (Regulatory Planning and Review): This rulemaking has been determined to be not significant for purposes of E.O. 12866 (Sept. 30, 1993).

D. Executive Order 13563 (Improving Regulation and Regulatory Review): The USPTO has complied with E.O. 13563 (Jan. 18, 2011). Specifically, the Office has, to the extent feasible and applicable: (1) made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) involved the public in an open exchange of information and perspectives among experts in relevant disciplines,

affected stakeholders in the private sector, and the public as a whole, and provided online access to the rulemaking docket; (7) attempted to promote coordination, simplification, and harmonization across Government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

E. Executive Order 13132 (Federalism): This rulemaking does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under E.O. 13132 (Aug. 4, 1999).

F. Executive Order 13175 (Tribal Consultation): This rulemaking will not: (1) have substantial direct effects on one or more Indian tribes, (2) impose substantial direct compliance costs on Indian tribal governments, or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under E.O. 13175 (Nov. 6, 2000).

G. Executive Order 13211 (Energy Effects): This rulemaking is not a significant energy action under E.O. 13211 because this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under E.O. 13211 (May 18, 2001).

H. Executive Order 12988 (Civil Justice Reform): This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden, as set forth in sections 3(a) and 3(b)(2) of E.O. 12988 (Feb. 5, 1996).

I. Executive Order 13045 (Protection of Children): This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under E.O. 13045 (Apr. 21, 1997).

J. Executive Order 12630 (Taking of Private Property): This rulemaking will not effect a taking of private property or otherwise have taking implications under E.O. 12630 (Mar. 15, 1988).

K. Congressional Review Act: Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.), the USPTO will submit a report containing the final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the Government Accountability Office. The changes in this rulemaking are not expected to result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this rulemaking is not expected to result in a "major rule" as defined in 5 U.S.C. 804(2).

L. Unfunded Mandates Reform Act of 1995: The changes in this rulemaking do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of $100 million (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of $100 million (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 et seq.

M. National Environmental Policy Act of 1969: This rulemaking will not have any effect on the quality of the environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 et seq.

N. National Technology Transfer and Advancement Act of 1995: The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions that involve the use of technical standards.

O. Paperwork Reduction Act of 1995: The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) requires that the Office consider the impact of paperwork and other information collection

burdens imposed on the public. This rulemaking does not involve information collection requirements that are subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act.

P. E-Government Act Compliance: The USPTO is committed to compliance with the E-Government Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 37 CFR Part 11

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

PART 11—REPRESENTATION OF OTHERS BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE

Accordingly, the interim final rule amending 37 CFR part 11, which published on November 14, 2022 (87 FR 68054), is adopted as a final rule without change.

Katherine K. Vidal,
Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

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